

**United States Department of Labor
Employees' Compensation Appeals Board**

P.C., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Long Branch, NJ, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 12-1437
Issued: February 5, 2013**

Appearances:

Thomas R. Uliase, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Alternate Judge

MICHAEL E. GROOM, Alternate Judge

JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 22, 2012 appellant, through her attorney, filed a timely appeal from a March 30, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly reduced appellant's compensation for the period January 24, 2003 to December 31, 2006, based on her actual earnings during the years 2003 through 2007.

On appeal, appellant's attorney asserts that her earnings in 2007 should not be considered in determining entitlement to compensation for the period January 24, 2003 through December 31, 2006.

FACTUAL HISTORY

This case has previously been before the Board.¹ In an August 18, 2010 decision, the Board found the case was not in posture for decision as to whether appellant established that she was entitled to disability compensation for the period April 16, 2003 to May 1, 2006. The Board found that the medical evidence of record supported that she had partial disability. Since the evidence reflected that appellant had actual earnings that spanned a lengthy period of time, compensation should be determined by averaging the earnings for the entire period, determining the average pay rate and applying the *Shadrick* formula.² Appellant furnished sufficient records that encompassed a number of years such that OWCP could compare her actual earnings to those wages earned when injured. The Board remanded the case for further development, to be followed by an appropriate decision of appellant's claim for compensation.

On November 3, 2010 OWCP accepted that appellant sustained a recurrence of disability on August 13, 2010 when she underwent authorized right knee surgery.

By letter dated November 4, 2010, OWCP informed appellant that, in accordance with the Board's August 18, 2010 decision, it had determined her entitlement to compensation for the listed periods as follows:

January 24 through December 31, 2003	\$8,304.40;
January 1 through December 31, 2004	\$9,803.78;
January 1 through December 31, 2005	\$10,347.71;
January 1 through December 31, 2006	\$11,551.61;
January 1 through December 31, 2007	\$12,142.03.

OWCP further determined that appellant was entitled to compensation following an accepted August 13, 2010 recurrence of disability and attached an explanatory pay rate memorandum. It determined that she earned an average of \$26,602.00 per year during the five-year period from 2003 through 2007, for average weekly earnings of \$511.58. OWCP found that appellant was last in a pay status (the date disability began) on January 23, 2003, when her weekly earnings were \$759.88. It determined that she was a grade 1 Step RC on the date

¹ Appellant, then a 44-year-old part-time flexible clerk, sustained a left knee injury on April 24, 2002. OWCP accepted as employment related a tear of the medial meniscus of the left knee and villonodular synovitis of the left lower leg. Appellant had arthroscopic left knee surgery in November 2002, did not return to work and retired on disability effective September 8, 2003. The record contains income tax returns for the years 2003 through 2006 and additional wage information for the year 2007.

² *Alfred C. Shadrick*, 5 ECAB 376 (1953); 20 C.F.R. § 10.403. The Board noted that appellant had provided information concerning her actual earnings in the private sector and income tax forms for the years 2003 through 2007.

disability began and indicated that for the purposes of applying the *Shadrick* formula, her earnings in subsequent years were as follows:³

2003	\$20.57 per hour x 37.93 hours per week	\$780.22 per week;
2004	\$21.25 per hour x 37.93 hours per week	\$806.01 per week;
2005	\$21.72 per hour x 37.93 hours per week	\$823.84 per week;
2006	\$23.00 per hour x 37.93 hours per week	\$872.39 per week;
2007	\$23.34 per hour x 37.93 hours per week	\$885.25 per week.

OWCP attached worksheets in which the *Shadrick* formula was applied, beginning January 24, 2003 and for each year thereafter, utilizing appellant's average weekly earnings for the years 2003 through 2007 or \$511.58. It also provided an election form, since appellant received OPM benefits and she was asked to carefully review the calculations.⁴

On December 2, 2010 appellant elected FECA benefits for the period January 24, 2003 to December 31, 2006, and beginning August 13, 2010 and continuing. OPM informed OWCP that appellant's OPM benefits would be suspended on May 5, 2011, and that for the period January 26, 2003 through December 31, 2006 and August 13, 2010 through March 31, 2011, she received OPM benefits totaling \$78,302.60. By letter dated June 7, 2011, OWCP informed appellant that OPM was owed a balance of \$78,302.60 which must be deducted from compensation payments and asked if she still wished to elect FECA benefits. On July 28, 2011 it again informed her regarding her entitlement to compensation beginning January 24, 2003 and continuing. On August 13, 2011 appellant again elected FECA benefits, effective August 10, 2010.

By letter dated September 12, 2011, counsel requested that a formal decision be issued with regard to OWCP's calculations of appellant's entitlement to compensation for the period January 24, 2003 through December 31, 2006.

In a September 29, 2011 decision, OWCP incorporated the November 4, 2010 pay rate memorandum and worksheets regarding the years 2003 through 2007 and beginning August 13, 2010, which explained appellant's entitlement to compensation for the period January 24, 2003 through December 31, 2006. On October 4, 2011 appellant, through counsel, requested a hearing. Appellant was not present at the hearing, held on January 4, 2012. Counsel asserted that OWCP erred in including appellant's 2007 earnings to determine her average weekly wage of \$511.58, which was used in applying the *Shadrick* formula to determine entitlement to compensation for the period January 24, 2003 through December 31, 2006. He noted that if it had instead used appellant's income for the years 2003 through 2006 to determine the average weekly wage, the average weekly wage would have been reduced to \$443.43.

³ OWCP noted that appellant earned \$19.77 a hour, and worked 37.93 hours a week and that beginning in 2009 and continuing the hourly pay rate was \$25.60 or \$971.08 a week.

⁴ Office of Personnel Management (OPM) verified that appellant received a gross monthly annuity of \$1,836.00.

In a March 30, 2012 decision, OWCP's hearing representative affirmed the September 28, 2011 decision.

LEGAL PRECEDENT

OWCP procedures provide that where OWCP learns of actual earnings that span a lengthy period of time, *e.g.*, several months or more, the compensation entitlement should be determined by averaging the earnings for the entire period, determining the average pay rate and applying the *Shadrick* formula.⁵ The *Shadrick* formula has been codified at section 10.403 of OWCP's regulations.⁶

ANALYSIS

The Board finds this case is not in posture for decision. The Board agrees with appellant's assertion on appeal that OWCP should not have included her 2007 earnings in establishing her average weekly wage to be used to determine her entitlement to compensation for the period January 24, 2003 through December 31, 2006, the period she elected to receive FECA benefits. Appellant did not claim compensation or elect FECA benefits for the year 2007. The case will be remanded for OWCP to ascertain appellant's earnings for the period claimed, *i.e.*, January 24, 2003 through December 31, 2006.⁷ OWCP should provide a breakdown of the specific earnings relied upon for this period and find the average weekly wage using these earnings only. It should compare appellant's earnings from the job held when injured to this information, and then apply the *Shadrick* formula to determine her entitlement to compensation for the period January 24, 2003 through December 31, 2006.⁸ After such further development deemed necessary, OWCP shall issue an appropriate decision.

CONCLUSION

The Board finds this case is not in posture for decision.

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity on Actual Earnings*, Chapter 2.814.7(d)(4) (October 2009); *Albert C. Shadrick*, *supra* note 2. OWCP calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job.

⁶ 20 C.F.R. § 10.403.

⁷ The Board notes that the pay rate memorandum that accompanied the November 4, 2010 letter of explanation and the September 29, 2011 decision did not include a breakdown of the income records OWCP relied upon in finding the average weekly wage of \$511.58.

⁸ *Supra* note 5. See also Federal (FECA) Procedure Manual Part 2 -- Claims, *Computing Compensation*, Chapter 2.901.15(e) (October 2009).

ORDER

IT IS HEREBY ORDERED THAT the March 30, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: February 5, 2013
Washington, DC

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board